

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT JACKSON

Assigned on Briefs April 11, 2001

KENTRAIL STERLING v. STATE OF TENNESSEE

Direct Appeal from the Criminal Court for Shelby County
No. 97-01419-22 Joseph B. Dailey, Judge

No. W1999-00608-CCA-R3-CD - Filed September 24, 2001

The defendant was convicted of two counts of especially aggravated kidnapping and two counts of aggravated robbery pursuant to Tennessee Code Annotated §§ 39-13-305 and 402. In this appeal the defendant raises the following issues: 1) whether the trial court had jurisdiction to try the defendant; 2) whether the judgments of the trial court for especially aggravated kidnapping are void because the defendant was not provided sufficient notice of the charged offenses; 3) whether Tennessee Code Annotated §§ 39-13-304(b)(2) and 305(a) are unconstitutionally vague and ambiguous since both statutes contain only one aggravating element - the employment of a deadly weapon; 4) whether trial counsel displayed impropriety during closing arguments by erroneously stating that the defendant had previously confessed to the crimes he was charged with; 5) whether counsel was ineffective; 6) whether the jury charge was “unconstitutionally vague and ambiguous for failure to charge as to any elements constituting especially aggravated kidnapping,” and 7) whether the defendant’s consecutive and enhanced sentences were proper. After examining each of these issues raised by the defendant we modify the aggravated robbery sentences but otherwise affirm the judgments of the trial court.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Criminal Court Affirmed as Modified

JOHN EVERETT WILLIAMS, J., delivered the opinion of the court, in which JOE G. RILEY and ROBERT W. WEDEMEYER, JJ., joined.

Kentrail Sterling, Tiptonville, Tennessee, Pro Se.

Paul G. Summers, Attorney General and Reporter; J. Ross Dyer, Assistant Attorney General; William L. Gibbons, District Attorney General; and Amy P. Weirich, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

The defendant, Kentrail Sterling, was indicted on two counts of especially aggravated kidnapping, both Class A felonies, and two counts of aggravated robbery, both Class B felonies. The defendant was subsequently convicted and sentenced to two eleven-year sentences as a Range I standard offender for the aggravated robbery convictions and to two twenty-two-year sentences as a Range I standard offender for the especially aggravated kidnapping convictions, all to be served consecutively. The defendant filed a motion for a new trial, which the trial court overruled. A timely notice of appeal was filed, and this appeal followed.

FACTS

On August 12, 1996, Kathy Escamilla and Vera Alma, the two victims in the instant case, drove from their homes in Chicago, Illinois to Memphis to attend an Elvis Presley festival. After arriving in Memphis, the two women went to a drive-thru window of a fast food restaurant and then stopped at a convenience store on the way to their hotel.

The two women pulled into the parking area of the convenience store sometime around midnight. After making their purchases, the women exited the store and walked back to the car driven by Ms. Escamilla. As they were walking, a car occupied by the defendant and another man pulled into a parking space next to where the women were parked. As Ms. Escamilla got into the driver's side of her car, the defendant jumped into the back seat and pushed a gun against the back of her seat. The defendant then yelled for Ms. Alma to get in the car or he would "shoot [Ms. Escamilla's] brains out." Ms. Alma got into the car and the defendant ordered Ms. Escamilla to drive.

The defendant directed Ms. Escamilla, as she drove, to a more secluded area. Ms. Escamilla observed that the car that the defendant had been riding in was following her car. During the drive, the defendant went through the women's purses taking anything of value as well as the jewelry the women were wearing. The defendant made several sexual remarks to the women and ordered Ms. Escamilla to pull over so that Ms. Alma could drive and Ms. Escamilla could get in the back seat with him. Ms. Escamilla pulled over and Ms. Alma got out of the car and began to walk around to the driver's side of the car. The defendant ordered Ms. Escamilla to stay seated. As Ms. Alma walked around the car she saw a charter bus driving down the road. Ms. Alma ran to the bus and flagged it down. Ms. Alma then ran back to the car and pulled Ms. Escamilla from the car. Both women then ran to the bus and the bus driver radioed dispatch to call the police.

After both women boarded the bus, the car that had been following Ms. Escamilla's car drove away. The defendant also drove away in Ms. Escamilla's car. The next morning both Ms. Escamilla and Ms. Alma returned to Chicago.

Later the same month, on August 21, 1996, not far from the convenience store where the women were abducted, police identified a red Honda automobile parked on the side of the road. The license plates on the car had apparently been changed, but further investigation of the vehicle revealed that it was the car stolen from Ms. Escamilla on the night of the crimes. As police were getting ready to recover the stolen car, the car sped off and ran a police cruiser off of the road as it was fleeing. The car was not recovered at that time; however, it was recovered at a later date. When the car was later processed, the fingerprints of Dedrick Beasley, the defendant's accomplice, were found in the car.

Dedrick Beasley was later arrested and when questioned about the crimes related to the car, inculcated the defendant in a statement to police. At that point, the Memphis Police Department contacted the Chicago Police Department and asked them to show the victims a photographic lineup. The Chicago Police Department had the victims meet at the West Belmont Street Precinct and showed them a photographic lineup that included the defendant. On August 31, 1996, both victims separately selected the defendant as the perpetrator of the crimes. The defendant was subsequently arrested, charged with and convicted of two counts of especially aggravated kidnapping and two counts of aggravated robbery.

ANALYSIS

The defendant sets forth a number of issues in this appeal. Specifically, the defendant raises as issues: 1) whether the trial court had jurisdiction to try the defendant as an adult; 2) whether the judgments of the trial court are void because the defendant was not provided sufficient notice of the charged offenses; 3) whether the jury charge was unconstitutionally vague for failing to charge any elements of especially aggravated kidnapping; 4) whether Tennessee Code Annotated sections 39-13-304(b)(2) and 305(a) are unconstitutionally vague and ambiguous since both statutes contain only one aggravating element - the employment of a deadly weapon; 5) whether the defendant's consecutive and enhanced sentences were proper; and 6) whether counsel's misstatement that the defendant had previously confessed to the crimes during closing arguments amounted to ineffective assistance of counsel. After a thorough review of each issue raised by the defendant, we conclude that none of the issues are meritorious.

A. Trial Court Jurisdiction Over Defendant

The defendant first contends that the trial court lacked jurisdiction to try him as an adult in this matter. Specifically, he contends that he was transferred to criminal court from juvenile court based on an unrelated charge of aggravated robbery for which he has never been indicted or tried. The defendant acknowledges that the charges against him for the especially aggravated kidnapping and aggravated robbery of Ms. Escamilla and Ms. Alma were included in the transfer order of the juvenile court. The defendant, however, contends that there was insufficient evidence presented on those charges to establish probable cause at the juvenile court transfer hearing. The defendant asserts that because neither Ms. Escamilla nor Ms. Alma testified at the transfer hearing, he was not

afforded due process when those matters were included with the unrelated aggravated robbery charge in the order transferring him to criminal court to be tried as an adult.

Tennessee Code Annotated section 37-1-134(a)(4)(A)-(C) provides that a child over sixteen years of age charged with a crime may be transferred to criminal court and treated as an adult if the court finds that there are reasonable grounds to believe that (1) the child committed the alleged delinquent act; (2) the child is not committable to an institution as retarded or mentally ill; and (3) the interests of the community require that the child be restrained or disciplined. In addition, Tennessee Code Annotated section 37-1-134 (c), provides that such a transfer terminates the jurisdiction of the juvenile court with respect to all pending and subsequent criminal charges against the child unless the child is acquitted in criminal court of the charge(s) resulting in the transfer or such charge(s) are dismissed. See, e.g., State v. Darden, 12 S.W.3d 455, 458-59 (Tenn 2000).

We first note, as the defendant acknowledges, that the record does not contain a transcript of the defendant's juvenile transfer hearing. The defendant argues, however, that he should not be penalized for the incomplete record because he could not afford a court reporter to record the proceedings and neither the court nor the State provided one. The defendant acknowledges that an audio recording of the proceeding, as authorized by Tennessee Code Annotated section 37-1-134(f)(2), was made by the juvenile court, but alleges that the recording was destroyed by the Juvenile Court Clerk according to policy. However, we need not reach the issue of whether there was sufficient evidence to support the transfer of the defendant for the charges of especially aggravated kidnapping and aggravated robbery of Ms. Escamilla and Ms. Alma because a valid transfer based upon the unrelated aggravated robbery charge was sufficient to divest the juvenile court of jurisdiction in all pending and subsequent criminal charges against the defendant including the instant offenses. See Darden, 12 S.W.3d at 458.

The defendant does not challenge the validity of his transfer to criminal court for the unrelated aggravated robbery charge. To the contrary, he asserts that this charge was the "primary offense upon which the transfer hearing/probable cause hearing was conducted." The defendant however, contends that because he was never "indicted tried, or convicted of" the unrelated aggravated robbery charge, the criminal court had no jurisdiction to hear the charges against him for the instant offenses. "Acquittal or dismissal of the charges resulting in the transfer is the predicate for the restoration of the juvenile court's jurisdiction." Darden, 12 S.W.3d at 458. Because the defendant has not presented any evidence to establish that the unrelated aggravated robbery charge was dismissed or that he was acquitted of such charge, he has failed to show that the criminal court did not have jurisdiction over the instant offenses. Thus, the defendant's claim that the trial court lacked jurisdiction to try him as an adult is without merit.

B. Insufficient Notice of Charged Offenses

The defendant next contends that the judgments of the trial court for especially aggravated kidnapping are void because the defendant was not provided sufficient notice of the charged offenses. Specifically, he argues that the language in the especially aggravated kidnapping

indictments, “by use of a deadly weapon, to wit: a handgun in violation of Tennessee Code Annotated 39-13-305,” failed to give him proper notice as to whether he had to defend against the offense of aggravated kidnapping, a Class B felony, or especially aggravated kidnapping, a Class A felony.

The Tennessee Supreme Court has stated that, in general, “an indictment is valid if it provides sufficient information (1) to enable the accused to know the accusation to which answer is required, (2) to furnish the court adequate basis for the entry of a proper judgment, and (3) to protect the accused from double jeopardy.” State v. Hill, 954 S.W.2d 725, 727 (Tenn. 1997) (citing State v. Byrd, 820 S.W.2d 739, 741 (Tenn. 1991); VanArsdall V. State, 919 S.W.2d 626, 630 (Tenn. Crim. App. 1995); State v. Smith, 612 S.W.2d 493, 497 (Tenn. Crim. App. 1980). The Tennessee Supreme Court has also set forth that “an indictment need not conform to traditionally strict pleading requirements.” Hill, 954 S.W.2d at 727-28. (citing State v. Pearce, 7 Tenn. 66, 67 (1823)). Tennessee Code Annotated section 40-13-202 provides that an indictment must set forth “the facts constituting the offense in ordinary and concise language, without prolixity or repetition, in such a manner as to enable a person of common understanding to know what is intended, and with the degree of certainty which will enable the court, on conviction, to pronounce the proper judgment.”

In the instant case, both of the indictments for especially aggravated kidnapping specifically alleged that the defendant committed “ESPECIALLY AGGRAVATED Kidnapping” pursuant to “T. C. A. 39-13-305a” by “knowingly remov[ing the victims] so as to interfere substantially with [their] liberty. . . by use of a deadly weapon, to wit: a handgun in violation of Tennessee Code Annotated 39-13-305.” (Emphasis added).

Tennessee Code Annotated section 39-13-305(a) sets forth that “Especially aggravated kidnapping is false imprisonment, as defined by § 39-13-302 . . . accomplished with a deadly weapon or by display of any article used or fashioned to lead the victim to reasonably believe it to be a deadly weapon” Tenn. Code Ann. § 39-13- 305(a)(1). Tennessee Code Annotated section 39-13-302 provides that “[a] person commits the offense of false imprisonment who knowingly removes or confines another unlawfully so as to interfere substantially with the other’s liberty.”

While the indictments do not set forth the exact language set out in Tennessee Code Annotated section 39-13-305(a), the indictments do set forth that the defendant “knowingly remove[d the victims] so as to interfere substantially with [their] liberty . . . by use of a deadly weapon.” This language in both indictments for especially aggravated kidnapping substantially mirrors the statute for especially aggravated kidnapping and clearly indicates that the indictments are based on the actual use of a deadly weapon to accomplish the kidnapping. Therefore, such language is sufficient to put the defendant on notice of the “accusation to which answer is required” and to put him on notice of the crime(s) against which he is required to defend.

In contrast, the crime of aggravated kidnapping does not require that the kidnapping be accomplished by use of a deadly weapon. Aggravated kidnapping is “false imprisonment . . . while the defendant is in possession of a deadly weapon or threatens the use of a deadly weapon.” Tenn.

Code. Ann. § 39-13-304 (a)(5) (emphasis added). The Sentencing Commission Comments make it absolutely clear that a conviction may be had if the defendant concealed deadly weapon in his possession, but did not mention or use the deadly weapon. The Sentencing Commission Comments further set forth that “[i]f the defendant actually used a deadly weapon or used something other than a deadly weapon but convinced the victim that it was a deadly weapon, the offense is punishable as an especially aggravated kidnapping under section 39-13-305(a)(1).” Nowhere under section 39-13-304 is the actual use or display of a deadly weapon required for a conviction. Indeed, such requirement was expressly reserved for the greater offense of especially aggravated kidnapping.

There is no discrepancy as to whether the defendant was being compelled to defend against the mere “presence” of a deadly weapon or the “use” of a deadly weapon. Nor is there any discrepancy with regards to whether the defendant was being tried for “aggravated kidnapping” or “especially aggravated kidnapping.” The indictments were clear as to the indicted offenses and in what manner such offenses were being charged. Thus, this issue is without merit.

C. Constitutional Validity of Tennessee Code Annotated §§ 39-13-304(b)(2) & 305(a)

The defendant next contends that Tennessee Code Annotated sections 39-13-304(b)(2) and 305(a) are unconstitutionally vague and ambiguous in that “the employment of a deadly weapon” is an aggravating element of both the aggravated kidnapping and the especially aggravated kidnapping statute. We disagree.

We first note the defendant’s clear misreading of Tennessee Code Annotated section 39-13-304(b)(2). Throughout the entire section of the defendant’s brief dealing with this issue, he repeatedly insists that Tennessee Code Annotated section 39-13-304(b)(2) contains, as an aggravating element for aggravated kidnapping, the language “the employment of a deadly weapon.” The defendant is clearly confused in his reading of the statute. Nowhere in Tennessee Code Annotated section 39-13-304, is the language “the employment of a deadly weapon” listed as an aggravating element. As we discussed in our analysis above, possession of a deadly weapon is an aggravating element of aggravated kidnapping, while accomplishment by use of a deadly weapon is an aggravating element for the greater offense of especially aggravated kidnapping. Tenn. Code Ann. §§ 39-13-304(a)(5), -305(a)(1).

Essentially, the defendant’s argument is that Tennessee Code Annotated section 39-13-305(a) is “vague and ambiguous” because the language “the employment of a deadly weapon” is analogous to the language in the statute for the lesser crime of aggravated kidnapping. We again pause to note the defendant’s misreading of the statute. Nowhere in Tennessee Code Annotated section 39-13-305(a) is the term “employment” of a deadly weapon used. The correct language set forth therein is “used or fashioned.” Having made this clarification we continue in our analysis. This court addressed the defendant’s vagueness argument, with respect to Tennessee Code Annotated section 39-13-305, in the case of State v. James R. Bishop, No. 03C01-9308-CR-00268, Lexis 536 (Tenn. Crim. App. August 18, 1994 at Knoxville) (“[N]either Tenn. Code Ann. section 39-13-304(a)(5), Aggravated Kidnapping or Tenn. Code Ann. section 39-13-305(a)(1), Especially Aggravated

Kidnapping are unconstitutionally vague.”). Since this court filed the James R. Bishop opinion, we have not deviated from our holding pertaining to the constitutionality of the statute for especially aggravated kidnapping.

“[T]he basic rule of statutory construction is to ascertain legislative purpose and intent as expressed in the statute. State v. Williams, 854 S.W.2d 904, 907 (Tenn. Crim. App. 1993) (citing Metropolitan Government of Nashville & Davidson Co. v. Motel Systems, Inc., 525 S.W.2d 840 (Tenn. 1975). Statutory meaning “is to be derived from the act as a whole in light of its general purposes.” Williams, 854 S.W.2d at 907 (citing Loftin v. Langsdon, 813 S.W.2d 475 (Tenn. Ct. App. 1991). Furthermore, Tennessee Code Annotated section 39-11-104 provides that “[t]he provisions of this title shall be construed according to the fair import of their terms, including reference to judicial decisions and common law interpretations, to promote justice and effect the objectives of the criminal code.”

Armed with the direction given above, we reject the defendant’s contentions that Tennessee Code Annotated section 39-13-305 is “vague and ambiguous” in any manner. A reading of the statute is clear in all parts. As we noted in our analysis above, the language of Tennessee Code Annotated section 39-13-305(a)(1) differs from the language of the statute for aggravated kidnapping in that it requires the actual use of a deadly weapon to accomplish the kidnapping. Further, the legislative intent is clear: that the legislature intended to treat and punish crimes under this statute more harshly than under statutes setting forth lesser crimes of the same nature- false imprisonment, kidnapping and aggravated kidnapping. Tenn Code Ann. §§ 39-13-302, 303 and 304. Thus, this issue is without merit.

D. Constitutional Validity of the Jury Charge

The defendant next argues that the charge given to the jury by the trial court was “unconstitutionally vague and ambiguous for failure to charge as to any elements constituting especially aggravated kidnapping.” Specifically, the defendant argues that no elements of especially aggravated kidnapping were charged to the jury that would distinguish the crime from that of aggravated kidnapping. The defendant argues that “the employment of a deadly weapon” would be sufficient for the state to prove either crime. We disagree.

We already examined the defendant’s contention that the language, “the employment of a deadly weapon,” is vague in that it applies equally to either aggravated kidnapping or especially aggravated kidnapping, and we will not address that issue again. We again note, however, that the “use” of a deadly weapon in conjunction with a false imprisonment is a distinct element of especially aggravated kidnapping and not an element of aggravated kidnapping, as the defendant continues to argue.

In turning to the defendant’s argument that no elements of especially aggravated kidnapping were charged to the jury, we look to the jury instructions contained within the record. The record distinctly shows that the trial court instructed the jury that in order to find especially aggravated

kidnapping the jury must find “that the confinement or removal [of the victims] was accomplished with a deadly weapon or by display of any article used or fashioned to lead the alleged victim to reasonably believe it was a deadly weapon.” Tennessee Code Annotated section 39-13-305(a) (1) provides that “[e]specially aggravated kidnapping is false imprisonment . . . [a]ccomplished with a deadly weapon or by display of any article used or fashioned to lead the victim to reasonably believe it to be a deadly weapon.” The jury charge for especially aggravated kidnapping was virtually word for word identical to the first element set forth above. Having found that the trial court did charge the jury with an exclusive element of especially aggravated kidnapping, this issue has no foundation upon which to stand and is without merit.

E. Ineffective Assistance of Counsel and Impropriety of Counsel During Closing Arguments

Next the defendant contends that counsel’s statements during closing arguments displayed impropriety and that this impropriety amounted to ineffective assistance of counsel. Therefore, we will analyze the issues together. We begin by noting that the defendant has chosen to pursue an ineffective assistance of counsel claim on direct appeal, as opposed to a post-conviction proceeding. On numerous occasions this court has warned against the pitfalls of raising such an ineffective assistance of counsel issue on direct appeal. Once again we pause to echo this warning as set forth by Judge Jones of this court in State v. Jimmy L. Sluder:

Raising issues pertaining to the ineffective assistance of counsel for the first time in the appellate court is a practice fraught with peril. The appellant runs the risk of having the issue denied due to a procedural default, or, in the alternative, having a panel of this court consider the issue on the merits. The better practice is to not raise the issue on direct appeal The issue can be subsequently raised in a post-conviction proceeding if the appellant’s direct appeal . . . is not successful.

State v. Jimmy L. Sluder, No. 1236, 1990 WL 26552, at *9 (Tenn. Crim. App., filed March 14, 1990, at Knoxville); see also Thompson v. State, 958 S.W.2d 156, 161 (Tenn. Crim. App. 1997); State v. Anderson, 835 S.W.2d 600, 607 (Tenn. Crim. App. 1992).

This court reviews a claim of ineffective assistance of counsel under the standards of Baxter v. Rose, 523 S.W.2d 930 (Tenn. 1975), and Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). A petitioner has the burden to prove that (1) the attorney’s performance was deficient, and (2) the deficient performance resulted in prejudice to the defendant so as to deprive him of a fair trial. Strickland, 466 U.S. at 687, 104 S. Ct. at 2064; Goad v. State, 938 S.W.2d 363, 369 (Tenn. 1996); Overton v. State, 874 S.W.2d 6, 11 (Tenn. 1994); Butler v. State, 789 S.W.2d 898, 899 (Tenn. 1990).

The test in Tennessee to determine whether counsel provided effective assistance is whether his performance was within the range of competence demanded of attorneys in criminal cases. Baxter, 523 S.W.2d at 936. The petitioner must overcome the presumption that counsel’s conduct

falls within the wide range of acceptable professional assistance. Strickland, 466 U.S. at 689, 104 S. Ct. at 2065; State v. Burns, 6 S.W.3d 453, 462 (Tenn. 1999). Therefore, in order to prove a deficiency, a petitioner must show “that counsel’s acts or omissions were so serious as to fall below an objective standard of reasonableness under prevailing professional norms.” Goad, 938 S.W.2d at 369 (citing Strickland, 466 U.S. at 688, 104 S.Ct. at 2065).

In reviewing counsel's conduct, a "fair assessment . . . requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." Strickland, 466 U.S. at 689, 104 S. Ct. at 2065. The fact that a particular strategy or tactic failed or hurt the defense, does not, standing alone, establish unreasonable representation. As long as choices are informed ones based upon adequate preparation. Henley v. State, 960 S.W.2d 572, 579 (Tenn. 1997); Hellard v. State, 629 S.W.2d 4, 9 (Tenn. 1982).

In the instant case, the defendant argues that trial counsel was ineffective because counsel stated during closing arguments that the defendant had previously confessed to the indicted crimes.¹ The defendant contends that “counsel ... displayed the ultimate impropriety in this case” and that this amounted to an abandonment of counsel’s adversarial role. In examining the first prong of our test for determining whether trial counsel was ineffective we look to whether trial “counsel’s acts or omissions were so serious as to fall below an objective standard of reasonableness under prevailing professional norms.” After a thorough review of this issue, we conclude that the record demonstrates quite the opposite. During closing arguments, trial counsel argued vehemently that the state had no physical evidence that inculpated the defendant in the crime, reiterated the weaknesses in the testimony given by the victims and the state’s witnesses, stressed the defendant’s repeated denials of being the individual who committed the crimes, stressed the testimony of the defendant’s alibi witnesses, and stressed the testimony of the defendant’s accomplice, who testified that the defendant’s name on his confession was incorrect. These arguments amply demonstrate that trial counsel did everything in his power to foster the defendant’s case, and do not support an allegation of impropriety. While the record does reflect that trial counsel erroneously stated during closing arguments that the defendant had previously confessed to the crimes he was being tried for, this statement must be examined in the context in which it was made. When trial counsel made this statement he was summarizing, one final time, the extent of the state’s proof against the defendant. It is clear that trial counsel mis-spoke, and instead of saying Dedrick Beasley, the defendant’s accomplice’s name, trial counsel mistakenly used the defendant’s name. Although trial counsel’s statement was obviously

¹ The defendant initially alleged ineffective assistance of counsel, stating only that “he was rendered ineffective assistance of counsel during the pretrial, trial and post trial phases of the criminal prosecutions against him.” In the defendant’s brief no argument was set out. After the state filed its brief asking this Court to consider the defendant’s ineffective assistance of counsel claim waived - due to the defendant’s failure to cite any authority and due to the defendant’s failure to brief the issue - the defendant filed a reply brief. In the defendant’s reply brief the defendant changed his ineffective assistance of counsel claim, stating that he “received the ineffective assistance of counsel during the trial of the causes.” The defendant thereafter set forth a two sentence paragraph alleging ineffective assistance of counsel based on trial counsel’s erroneous statement regarding the defendant’s confession.

a mistake, in no manner does the record show that trial counsel acted intentionally or maliciously as the defendant argues.

Given the context of the erroneous statement, the strong arguments in favor of the defendant immediately prior to the statement, the fact that the defendant's accomplice's confession was the only confession introduced during trial, and the weight of the other evidence introduced at trial, we can not conclude that trial counsel's error amounted to deficient performance. Having concluded that the defendant failed to meet the first prong of the test for proving ineffective assistance of counsel, we need not address the second prong of this test. This issue is without merit.

G. Validity of Defendant's Consecutive and Enhanced Sentences

The last issue we are called upon to address by the defendant is whether his consecutive and enhanced sentences were proper. After a thorough review, we conclude that both the enhanced and consecutive sentences were proper.

This court's review of the sentence imposed by the trial court is de novo with a presumption of correctness. Tenn. Code Ann. § 40-35-401(d). This presumption is conditioned upon an affirmative showing in the record that the trial judge considered the sentencing principles and all relevant facts and circumstances. State v. Ashby, 823 S.W.2d 166, 169 (Tenn. 1991). The burden is upon the appealing party to show that the sentence is improper. Tenn. Code Ann. § 40-35-401(d), Sentencing Commission Comments. In conducting our review, we are required, pursuant to Tennessee Code Annotated section 40-35-210, to consider the following factors in sentencing:

- (1) [t]he evidence, if any, received at the trial and the sentencing hearing;
- (2) [t]he presentence report;
- (3) [t]he principles of sentencing and arguments as to sentencing alternatives;
- (4) [t]he nature and characteristics of the criminal conduct involved;
- (5) [e]vidence and information offered by the parties on the enhancement and mitigating factors in §§ 40-35-113 and 40-35-114; and
- (6) [a]ny statement the defendant wishes to make in the defendant's own behalf about sentencing.

If no mitigating or enhancement factors for sentencing are present, Tennessee Code Annotated section 40-35-210(c) provides that the presumptive sentence for a Class A felony shall be the midpoint of the applicable range and the minimum sentence within the applicable range for a Class B or lower felony. See State v. Lavender, 967 S.W.2d 803, 806 (Tenn. 1998); State v. Fletcher, 805 S.W.2d 785, 788 (Tenn. Crim. App. 1991). However, if such factors do exist, a trial court should start at the minimum sentence, enhance the minimum sentence within the range for enhancement factors, and then reduce the sentence within the range for the mitigating factors. Tenn. Code Ann. § 40-35-210(e). No particular weight for each factor is prescribed by the statute, as the weight given to each factor is left to the discretion of the trial court as long as the trial court complies with the purposes and principles of the sentencing act and its findings are supported by the record. State v. Moss, 727 S.W.2d 229, 238 (Tenn. 1986); State v. Leggs, 955 S.W.2d 845, 848 (Tenn. Crim. App. 1997); see Tenn. Code Ann. § 40-35-210, Sentencing Commission Comments. Furthermore, if our review reflects that the trial court followed the statutory sentencing procedure, imposed a lawful sentence after giving due consideration and proper weight to the factors and principles set out under

sentencing law, and the trial court's findings of fact are adequately supported by the record, we may not modify the sentence even if we would have preferred a different result. Fletcher, 805 S.W.2d at 789.

The trial court found the following enhancement factors applicable, as listed in Tennessee Code Annotated section 40-35-114: (1) The defendant has a previous history of criminal convictions or criminal behavior in addition to those necessary to establish the appropriate range; and (2) The defendant was a leader in the commission of an offense involving two or more criminal actors. The record reveals that in applying factor (1), the court relied on the defendant's previous history of criminal behavior as evidenced by his juvenile record. The trial court's consideration of the juvenile offenses under factor (1) was improper. The legislature added factor (20) to the existing list of enhancement factors in 1995, which provides that juvenile delinquency adjudications for acts committed as a juvenile that would constitute felonies if committed by an adult may be used for enhancement purposes. Tenn. Code Ann. § 40-35-114 (20). "This court has determined that as a result of the amendment, 'factor (20) became the exclusive factor for enhancing a sentence based on a juvenile's record.'" State v. Adams, 45 S.W.3d 46, 58 (Tenn. Crim. App. 2000) (citing State v. Brown, No. 02C01-9710-CC-00419, 1998 Tenn. Crim. App. LEXIS 1112, at *6, (Tenn. Crim. App., filed Oct. 26, 1998, at Jackson)). Thus, this court could only properly consider the defendant's juvenile offenses for enhancement purposes under factor (20) and not pursuant to factor (1). See Adams, 45 S.W.3d at 58.

Having determined that the trial court erred by considering the defendant's juvenile offenses pursuant to factor (1), we must now determine whether factor (20) applies. A review of the defendant's juvenile record reveals that the defendant's juvenile record includes delinquency adjudications for public intoxication, unruly conduct, ride solicitation, resisting arrest and two thefts of property under five hundred dollars. All of the defendant's delinquency adjudications would have been misdemeanors if committed as an adult. Therefore, factor (20) is inapplicable as an enhancement factor.

Our de novo review of the record reveals that the trial court's application of factor (2), the defendant was the leader in the commission of an offense involving two or more criminal actors, was proper. The record supports that another actor was involved in the commission of the instant offense, to wit: the accomplice, who followed the victims' car as the defendant directed them to a more secluded area. Evidence that the defendant kidnapped the victims at gunpoint and rode in the car with them, as opposed to following behind in another car, supports his status as the leader in the commission of the crimes.

In summary, the application of factor (1), using the defendant's prior juvenile delinquency adjudications was not proper. The application of factor (2), the defendant was the leader in the commission of an offense involving two or more criminal actors, was proper. Finally, the trial court correctly found no mitigating factors. The trial court sentenced the defendant to eleven (11) years for each of the Class B, aggravated robbery convictions, three (3) years more than the minimum for the range, and to twenty-two (22) years for each of the Class A, especially aggravated kidnapping

convictions, two (2) years more than the mid-point for the range. Because of the misapplication of enhancement factor (1), we modify the sentences for the aggravated robbery convictions from eleven (11) years to ten (10) years, and affirm the twenty-two (22) year sentences for the especially aggravated kidnapping convictions.

We next turn our attention to the trial court's imposition of consecutive sentences. A court may order sentences to run consecutively if the court finds by a preponderance of the evidence that:

- (1) [t]he defendant is a professional criminal who has knowingly devoted such defendant's life to criminal acts as a major source of livelihood;
- (2) [t]he defendant is an offender whose record of criminal activity is extensive;
- (3) [t]he defendant is a dangerous mentally abnormal person so declared by a competent psychiatrist who concludes as a result of an investigation prior to sentencing that the defendant's criminal conduct has been characterized by a pattern of repetitive or compulsive behavior with heedless indifference to consequences;
- (4) [t]he defendant is a dangerous offender whose behavior indicates little or no regard for human life, and no hesitation about committing a crime in which the risk to human life is high;
- (5) [t]he defendant is convicted of two (2) or more statutory offenses involving sexual abuse of a minor with consideration of the aggravating circumstances arising from the relationship between the defendant and victim or victims, the time span of defendant's undetected sexual activity, the nature and scope of the sexual acts and the extent of the residual, physical and mental damage to the victim or victims;
- (6) [t]he defendant is sentenced for an offense committed while on probation; or
- (7) [t]he defendant is sentenced for criminal contempt.

Tenn. Code Ann. § 40-35-115(b); see also State v. Black, 924 S.W.2d 912, 917 (Tenn. Crim. App. 1995). Furthermore, in the event that a trial court finds that a defendant is a "dangerous offender," it must also determine whether the consecutive sentences (1) are reasonably related to the severity of the offenses committed; (2) serve to protect the public from further criminal conduct by the offender; and (3) are congruent with general principles of sentencing. State v. Wilkerson, 905 S.W.2d 933, 939 (Tenn. 1995).

In this case, the trial court found that the defendant was a dangerous offender, stating "there can be no argument the [the defendant's] conduct [the night of the offenses] demonstrated little or no regard for human life, [and] little or no hesitation to act in a manner that was threatening to human life." See Tenn. Code Ann. § 40-35-115(b)(4). The trial court further found that "the facts of [the] case, along with the factors set out in Gray, and the statute addressing consecutive sentencing clearly cry out for all four of [the] sentences to be served consecutively."

Our review of the record supports the trial court's findings and we conclude that the trial court properly imposed consecutive sentencing. We agree with the trial court that the circumstances of the instant offenses justify a "dangerous offender" classification. Moreover, the aggregate sentence was justly deserved in relation to the seriousness of the four offenses. Finally, although only seventeen years of age at the time the present offenses were committed, the defendant's prior criminal history

included more than five juvenile delinquency adjudications. Therefore, the defendant's sentence was necessary in order to protect the public from further criminal conduct by the defendant.

CONCLUSION

Because the trial court incorrectly applied an enhancement factor in determining the length of the defendant's sentence, we modify the sentences for the two aggravated robbery convictions, but affirm the sentences for the two especially aggravated kidnapping convictions and the trial court's imposition of consecutive sentences. Therefore, the resulting sentences are ten (10) years for each of the aggravated robbery convictions and twenty-two (22) years for each of the especially aggravated kidnapping convictions based upon one enhancement factor. The sentences shall run consecutive to each for an effective sixty-four year (64) sentence. All other judgments of the trial court are affirmed.

JOHN EVERETT WILLIAMS, JUDGE